SUPREME COURT, U. S.

FILED

NOV 3 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. [redacted] 124

ESTATE OF BETTY BERRY, Deceased,
LOUIS BERRY, Executor,
LOUIS BERRY, Surviving Spouse,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

LCG TRUST NO. 2, A. R. GLANCY, JR.,
Successor Trustee,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

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WO. 2-8745—WO. 2-8732

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OCTOBER TERM 1966

No. 1349

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LOUIS BERRY, Executor,
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Respondent,

LCG TRUST NO. 2, A. R. GLANCY, JR.,
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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR REHEARING

The petitioners respectfully petition this Honorable Court for a rehearing of the decision denying their petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit in the above entitled cause, and in support of this petition represent to the Court as follows:

The Fifth Amendment to the Constitution of the United States provides that no person shall "be deprived of life, liberty or property without due process of law". One of the rights guaranteed to every person by this amendment is the right to have disputes in which he is involved decided by a fair and impartial tribunal. This right has been recognized in a number of decided cases. One of these cases states:

> One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case. *Knapp v. Kinsey,* 232 F.2d 458 at 465 (CA 6, 1956).

Nor is such a right limited to the Courts established by the constitution, rather it extends to statutorily established courts and administrative tribunals.

> . . . a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trial be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. *N.L.R.B. v. Phelps, et al.,* 136 F.2d 562 at 563 (CA 5, 1943).

One of the aspects of the right to a fair hearing before a fair tribunal is that the trier of the facts must listen to the testimony and evidence introduced at the hearing with an open mind, and must not form an opinion until all of the evidence has been received. As one court stated:

> . . . a judgment, decision or determination by a judge or chancellor prior to a hearing of all the evidence amounts to a deprivation of property without due process. *Rosenberg v. Baum,* 153 F.2d 10 at 16 (CA 10, 1946).

Judge Bruce, who wrote the majority opinion in the case at bar, heard and decided the related case of *Raleigh Properties, Inc. v. The Commissioner.* In both cases, the issue is the factual determination of what the intention of the parties to a real estate transaction was regarding interest. In *Raleigh Properties,* the taxpayer claimed that $440,000.00 of the purchase price represented prepaid interest. After hearing all of the testimony, Judge Bruce decided that the evidence showed that the parties to the sale intended that the amount should be interest.

In the instant case, the sellers of the property contend that no part of the purchase price was intended to be interest. Judge Mulroney, after hearing all the testimony decided that the evidence showed that the parties did not intend any part of the purchase price should be interest. However, Judge Bruce wrote an opinion that the decision in *Raleigh Properties* required a decision against the taxpayer in this case. His opinion was accepted by a majority of the Court, and was affirmed *per curiam,* by the Court of Appeals for the Sixth Circuit, which accepted his factual determination without question.

The Tax Court of the United States is a trial Court rather than an appellate court. As a trial court it is charged with the responsibility of making factual determinations. These factual determinations should be made by that judge who has had the opportunity to observe the demeanor of the witnesses as they testify. These factual determinations should not be made by one who has not had an opportunity to observe the witnesses; nor should a judge who has heard a related case be allowed to influence other members of the court in making their decision.

The facts adduced in the case at bar are not the same as in *Raleigh Properties.* The testimony was not the same in the two cases. Petitioners are entitled to have their case decided on the basis of the facts and testimony which was introduced at their trial. To deny them this right is to deprive them of their property without due process of law.

It is the contention of the petitioners in this matter that Judge Bruce pre-judged the case at bar in that he had already formed an opinion that the purchasers in this land transaction were entitled to deduct the sum of $440,000.00 as interest. Having determined in the one case that this sum did represent interest, it would be logically difficult, if not impossible, for that Judge to rule that the sum was not interest in another case.

That the decision in the *Raleigh Properties* case dictated Judge Bruce's opinion in this case, can be seen from the fact that his opinion in this case consists almost completely of a quotation from his opinion in the former case.

The situation of the case at bar is analogous to a problem which frequently arises in the various federal appellate courts where by practice, if not by rule, no judge who has tried a case at the district court level ever sits on the panel which reviews that case on appeal.

For the foregoing reasons this Petition should be granted.

Respectfully submitted,

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